UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NINETEENTH REGION

J & J SNACK FOODS HANDHELDS CORP.

and

Case 19-CA-126632, 127401, 127413, 127689, 134279

TEAMSTERS NO. 839

POST HEARING BRIEF FOR RESPONDENT J & J SNACK FOODS HANDHELDS CORP.

I. INTRODUCTION

Respondent J & J Snack Foods Handhelds Corp. ("J&J") submits this Post Hearing Brief in further support of the positions it outlined at the hearing held on December 16 and 17, 2014 and January 8, 2015. Specifically, as argued more fully below, J&J did not violate section 8(a)(1) or section 8(a)(5) of the NLRA for the following reasons:

- J&J was justified in banning Mr. Davies from the facility because of his harassing, threatening and unprofessional conduct;
- J&J had no obligation to bargain over its decision to suspend QA samples because the decision did not result in a material, substantial and significant change and the practice of providing QA samples had been unilaterally terminated in the past;
- J&J had no obligation to bargain over its decision to change plant access/visitation rules to conform the rules to the parties collective bargaining Agreement ("CBA") because the change was not material, substantial or significant;
- J&J did not directly deal with its employees by requesting permission before disclosing confidential personal information; and
- J&J's letter of April 24, 2014, did not restrain its employees' section 7 rights.

Accordingly, for the all the reasons set fourth herein, as well as those outlined at the hearing, J&J respectfully requests that all the allegations in the Complaint be dismissed.

II. STATEMENT OF FACTS

A. The Weston Plant

As part of its nationwide snack food manufacturing and distribution operation, J&J operates a plant in Weston, Oregon ("Weston Facility"). The Weston Facility employs roughly 165 individuals. (Tr. at 367:14). The plant manufactures multiple different products including: pretzels, pretzel dogs, Nutrisystem product, ALDI Fit and Act product and a "pork, sauce and cheese product enrobed in dough and flash fried" that is termed a "line two handheld." Each product is made on a different line in the factory. (Tr. at 367:20-25, 368:1-6). The Nutrisystem, ALDI Fit and Active and line two handheld products are made on line two and are USDA products. (Tr. at 368:10-20). The USDA periodically inspects the Weston Facility to make sure that line two is clean, the ingredients are up to date and all rules and regulations are being satisfied. Id. Of the USDA products, only the line two handheld is tested by the Quality Assurance lab. (Tr. at 400:18-20).

The non-supervisory employees of the plant are represented by Teamsters Local 839 ("Local 839" or "Union"). Roughly 155 of the Weston facilities 165 employees are represented by Local 839. (Tr. at 367:15-17). The President of Local 839 is Robert Hawks. The union business representative at the Weston Facility is Rich Davies. J&J and Local 839 have had a relationship since J&J purchased the Weston Facility in 2011 and recognized the Union as having majority status at the Weston Facility. The parties have successfully negotiated two collective bargaining agreements. The current collective bargaining agreement is in effect until 2017.

B. Rich Davies Poisons the Relationship Between Local 839 and J&J

In late 2013 and early 2014, J&J hired a new plant manager, Adam Ligon and a new human resources manager, Karen Schofield. Shortly after both Mr. Ligon and Ms. Schofield began working, Mr. Davies began to act in an unprofessional, uncooperative and harassing manner.

Mr. Davies first engaged in unprofessional and dishonest conduct on March 13, 2014, at a step three grievance meeting regarding the termination of three employees for allegedly stealing frozen product. This meeting was attended by Mr. John Humble, Quality Assurance Manager, Ms. Schofield, Ms. Sandy McCullough, Human Resources Administrator, Mr. Davies and Mr. Hawks. (Tr. at 367:6-8). At that meeting, Mr. Davies argued that the discipline should be rescinded because the employees had acted in concert with plant practice by taking frozen food out of the plant. (Tr. at 100:15-17). During this meeting, Mr. Davies stated that he knew for a fact that employees as well as supervisors were taking product out of the Weston Facility and reselling the product. (Tr. at 373:4-12). Mr. Ligon asked Mr. Davies to identify these individuals and he refused to, stating that "these are my friends ... and I do not want to throw anybody under the bus." (Tr. at 372:2-18). Unbelievably, after the meeting concluded, Mr. Davies denied ever stating that he had knowledge of individuals taking product from the plant and reselling it and accused Mr. Ligon and Ms. Schofield of lying or twisting his words. (Tr. at 124:15-25). At the hearing, every J&J witness present at the March 13 meeting, including Mr. Ligon, Mr. Humble and Ms. McCullough all testified that Mr. Davies stated he knew employees were taking product from the plant and reselling it. (Tr. at 313:9-24; 373:4-18, 472:4-10).[1]

[1] Mr. Davies testimony that he never stated he knew of employees taking product from the plant and reselling it at the time of the meeting is further discredited by the testimony of Mr. Hawks. Mr. Hawks testified that at the March

Mr. Davies false accusation that Mr. Ligon and Ms. Schofield mischaracterized what he said at the March 13 meeting, coupled with his disingenuous denial of having any knowledge of employees reselling product, did substantial harm to the bargaining relationship. Instead of working to improve the situation, Mr. Davies's unprofessional conduct worsened. After the March 13, 2014 meeting, Mr. Davies testified that he had a "beef" with Ms. Schofield and started treating her in a hostile and harassing manner. (Tr. at 118:7). When Ms. Schofield suggested that employees would need to consent before she provided their contact information to the Union, Mr. Davies insulted her competence by mockingly asking her "who is your attorney" and threatened litigation. (Joint Exhibit 6; Respondent Exhibit 10 ("Anytime I don't get it ... we will file a charge with the Board")). When Mr. Davies attended grievance meetings with Ms. Schofield he would ignore her, refuse to refer to Ms. Schofield by her name and speak to her in an aggressive tone. (Tr. at 319:11-14; 322:21-22).

Mr. Davies harassing, hostile and unprofessional conduct toward Ms. Schofield culminated at an April 10, 2014 grievance meeting. The meeting involved the discipline of a Spanish speaking employee whose grievance was written in Spanish. After Ms. Schofield began the meeting and stated her position, Mr. Davies attacked her. Accordingly to Ms. McCullough, an eye-witness to Mr. Davies's rant, he stood up, began to flail his arms, and acted in a threatening manner. He called her a "monolingual idiot" and questioned her competency to perform her job. He also said that she was "ugly," "mean" and unprofessional. Mr. Davies tirade lasted several minutes. (Tr. 316:14-25, 317:1-15). Mr. Davies conduct at this meeting was so outrageous that J&J's counsel sent Mr. Davies a letter informing him that such behavior

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13, 2014 meeting he told Mr. Ligon if supervisors were selling product outside the plant he would give that information to the prosecuting attorney. (Tr. at 209:10-25). There would be no reason for mentioning that the Union would provide the names of supervisors reselling product to the district attorney unless that conduct was currently ongoing. Clearly, the Union was discussing supervisors reselling product at that time, not an incident thirteen years earlier as Mr. Davies testified.

would not be tolerated and, if it continued, could result in his removal from the Weston Facility. (Joint Exhibit 5).

Several days later, on April 22, 2014, Mr. Davies engaged in hostile and unprofessional behavior towards Mr. Ligon. That day, Mr. Ligon sent Mr. Davies an email informing him of some slight changes to the plant access rules to harmonize, in Mr. Ligon's view, the rules with the Parties' CBA. (Tr. at 388:11-22). When Mr. Davies saw Mr. Ligon in the cafeteria, he shouted at him in a loud voice that he received the email and that he disagreed with the change. (Tr. at 388:23-389). Mr. Davies than began to follow Mr. Ligon and, in an escalating tone, challenged Mr. Ligon's ability to enforce the new plant access rules and threatened litigation. Id. Ultimately, Mr. Davies became so irate that he called Mr. Ligon an "ass" and stormed out of the Weston Facility. (Tr. at 390:1).

On April 23, 2014, Mr. Davies was banned from the Weston Facility because of his hostile, harassing and unprofessional conduct. On April 24, 2014, a letter was distributed to all employees informing them of Mr. Davies ban.

C. Suspension of QA Samples

The Quality Assurance lab at the Weston Facility conducts bi-weekly tests on the line two handheld products to ensure they meet J&J standards. Some of the tested product would then be placed in the cafeteria for employees to consume. The remainder would be shipped to a hog farm. No other product was ever tested or allowed to be consumed by employees. (Tr. at 280:16-18; 400:18-20). In early 2012, the practice of allowing employees to consume QA samples was unilaterally discontinued by the plant manager at the time, Rob Tiberino because of reports that employees were removing the samples from the refrigerator in the QA lab. (Tr. at

449:13-25; 450:1-7). A few months later, the practice was unilaterally restarted. (Tr. at 454:8-10).

The practice of allowing QA samples to be consumed was again suspended in March, 2014, after Mr. Davies stated he knew that employees were taking product from the Weston Facility and reselling it. (Tr. at 373:8-12). After Mr. Davies told the employer that he knew employees were taking food from the plant and reselling it at the March 13 meeting, Mr. Humble contacted the specific USDA inspector assigned to the Facility, Steven Hilberg, to determine whether reselling product outside of the plant by employees could result in the Weston Facility losing its USDA license. (Tr. at 374:16-23; 451:18-453:23). The USDA confirmed that since this could be a second infraction (ConAgra had received such an infraction when it owned the Facility) if non-salable product was being resold outside the facility, the Weston Facility could lose its USDA license. (Tr. at 375:8-11). Mr. Ligon, after consultation with Mr. Humble, determined it was too great a risk and decided to discontinue the practice of providing QA samples for consumption. (Tr. at 375:14-16).

III. LEGAL ARGUMENT

A. J & J was Justified in Refusing to Deal With Mr. Davies Because of His Threatening, Unprofessional and Discriminatory Conduct.

1. Mr. Davies' continual conduct despite being warned that he would lose his permission to enter the facility justified his banishment from J&J's Weston Facility.

It is well settled that each party to a collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party. Fitzsimmons Mfg. Co., 251 NLRB 375, 379 (1980). A party's right to select its representative, however, is not absolute, and the other party is relieved of its

duty to deal with a particular representative when that representative's presence would render collective bargaining impossible or futile. Id. Accordingly, an employer is justified in refusing to deal with a union representative where the representative's conduct rises to a "clear and present danger to the bargaining process or would create such ill will as to make bargaining impossible or futile." CBS, Inc., 226 NLRB 537, 539 (1976). Importantly, the Board's analysis of whether an individual representative has engaged in such conduct is a factual inquiry dependent upon the context of each situation. Pan American Grain Co., Inc., 343 NRLB. No. 32 (2004).

Mr. Davies' conduct made good faith bargaining impossible because he: 1) engaged in unlawful harassment of Ms. Schofield, 2) engaged in threatening behavior towards Mr. Ligon; and 3) intended to create ill will between J&J and the Union. First, Mr. Davies unlawful harassment of Ms. Schofield resulted in his loss of the NLRA's protection. The Division of Advice has concluded, and the Board has adopted, that an employer may lawfully refuse to meet with a union representative when that representative has engaged in conduct that is potentially unlawful harassment. Chas H. Lilly Co., 30 NLRB AMR 40055 (1996). Mr. Davies' conduct, which was corroborated by multiple witnesses included: staring at Ms. Schofield; making gender based remarks such as routinely calling her "she" or "her" instead of her real name; verbally assaulting her; calling her derogatory names; and threatening her. This conduct is sufficient to create a triable question as to whether Mr. Davies' conduct was unlawful harassment. See e.g. Powell v. Las Vegas Hilton Corp., 841F. Supp. 1024 (D. Nev. 1992) (finding that two incidents of gender based remarks and staring at plaintiff sufficient to create issue of fact as to whether customer engaged in harassment); Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (reversing grant of summary judgment on plaintiff's harassment claim and concluding that

verbal tirade, derogatory comments and staring sufficient evidence to articulate prima facie case of harassment).

Underscoring the unprofessional, discriminatory and harassing conduct that Mr. Davies forced Ms. Schofield to endure, is the credible testimony of Sandy McCullough. Ms. McCullough, who admitted to having a good relationship with Mr. Davies, testified about Mr. Davies harassing conduct at a meeting with Ms. Schofield on April 10, 2014. (Tr. at 95:14-15). Ms. McCullough testified:

> "He immediately attacked her viciously. I've never seen him act so poorly, really. And I've seen him in several situations over the years. I've been in a lot of meetings with the Union, acting, you know, as the HR manager or just being there taking notes. I was a note taker for a long time. But he attacked her. He told her how unprofessional she was. First thing he said is, **why do you have to be so ugly**. Why do you have to be so mean? And then he said you don't do your job. You don't know what your (sic) doing. You are absolutely a monolingual idiot or something to that effect. And he – just kept on and kept on." (Tr. 316:14-25).

Mr. Davies's description of Ms. Schofield as acting "ugly" is illustrative of his gender-based vitriol. Mr. Davies used the word ugly in describing Ms. Schofield to disparage her on the basis of her gender; the hallmark of gender-based harassment.

Ms. McCullough further testified that when Mr. Davies met with Ms. Schofield he would stand up, flail his arms, and act in an unusual and threatening manner. (Tr. at 317:8-15). He also would routinely call Ms. Schofield a liar, denigrate her competency and professional behavior and ignore her at meetings while recognizing the men in the room. (Tr. at 319:11-14; 322:21-22). Mr. Davies admitted that he had a "beef" with Ms. Schofield. (Tr. at 118:7). Based upon this threatening, unprofessional and potentially discriminatory conduct, Mr. Davies' actions made good faith bargaining impossible.

Moreover, the Company has an affirmative obligation under Title VII to protect its employees from harassment by non-employees. Powell, 841 F.Supp. 1028, 1030 (employer could be liable under Title VII for harassment of non-employee). The Company had an affirmative obligation to remove Mr. Davies from the premises and refuse to meet with him because of the complaints Ms. Schofield made regarding his conduct. Title VII affords every employee a right to work in an environment free from discriminatory insult, intimidation and ridicule. Mr. Davies' unprofessional, boorish and threatening behavior denied Ms. Schofield her right to work in a safe gender-harassment free environment.

Second, Mr. Davies' conduct towards Mr. Ligon, including engaging in a verbal harangue and stalking him through the plant, is also inconsistent with Mr. Davies' bargaining obligations and, coupled with the harassment of Ms. Schofield, was sufficient to render good faith bargaining impossible. Mr. Davies admitted that he called Mr. Ligon an "ass" in a hostile tone after having a disagreement with Mr. Ligon regarding plant access rules. (Tr. at 73:22-24). Mr. Davies also mocked Mr. Ligon's southern heritage and denigrated his work performance. (Tr. at 325:15-21).

Finally, Mr. Davies engaged in unprofessional, hostile and profane behavior with the express purpose of poising the bargaining relationship between the Union and J&J. Mr. Davies testified that he called J&J's attorney, Alfred D'Angelo, an "ass" in order to give Karen "something to say to Harry [J&J's vice president]." (Tr. at 156:2-4). He admitted that he made the comment so that Harry would realize the depth of his antagonism for J&J. (Tr. at 156:2-13; see also Tr. at 118:7 ("my beef was with Karyn Schofield.")).

This pattern of harassing, discriminatory and hostile conduct is inimical to the development of a positive bargaining relationship and constitutes the type of conduct that is a "clear and present danger to the bargaining process or would create such ill will as to make bargaining impossible or futile." CBS, Inc., 226 NLRB 537, 539 (1976). It should be of no moment that Mr. Davies did not physically threaten or assault any J&J employee, as prior board case law emphasizes, because the norms of acceptable workplace conduct have evolved in the 21st century. Harassing, threatening and hostile conduct is unlawful under federal and state employment discrimination laws and federal labor laws should not set a lower standard. Accordingly, J&J was justified in banning Mr. Davies from the Weston Facility and requesting that the union appoint a different business agent to the facility.

2. Mr. Davies' self-serving testimony should be discredited.

Mr. Davies self-serving testimony, particularly his denials of engaging in unprofessional, discriminatory and threatening behavior, should be discredited because of his contradictory, unsupported and false testimony. First, Mr. Davies testimony was self-contradictory. For example, Mr. Davies testified that he did not remember what he said at a March 13, 2014 step three meeting involving the discipline of three employees accused of stealing frozen product. (Tr. at 107:4-21). He further testified that he did not recall what Mr. Hawks said at the meeting or what Ms. Schofield said at the meeting. (Tr. at 108:11-22). In fact, he stated that he "did not have a good recall of that meeting." (Tr. at 108:15). Incredibly, the one thing Mr. Davies did allegedly remember was that he was sure he did not say that he knew about other employees taking product from the plant and reselling it; despite the fact that Mr. Ligon and Ms. McCullough both testified that he made that statement at the March 13 meeting. (Tr. at 108:3-7;

110:19-111:21; Respondent Exhibit 9). It simply defies belief that Mr. Davies could remember nothing about the meeting except for the one statement he was accused of making.

Second, Mr. Davies testimony was directly rebutted by the consistent testimony of every employer witness. Mr. Davies testified that he did not state he had knowledge of other employees taking product and reselling it at a March 13, 2014 step three meeting, yet both Ms. McCullough and Mr. Ligon testified he did. (Tr. at 105:23-25- 106:1; 313:9-24; 373:4-18).[2] Mr. Davies testified that he did not call Ms. Schofield a monolingual idiot, yet Ms. McCullough, an employee that Mr. Davies admitted was trustworthy, testified that he did call her an idiot. (Tr. at 81:6-7; Tr. 316:14-25). Mr. Davies testified that the practice of providing QA samples to employees had never been broken, yet Mr. McGuire, a union steward, and Mr. Humble both testified, and it is undisputed that the practice was unilaterally suspended for several months in 2012. (Tr. at 139:1-20; Tr. at 28:14-16, Tr. at 46). Simply put, to credit Mr. Davies testimony, would require concluding that everyone but Mr. Davies is a liar.

Accepting Mr. Davies testimony would require discrediting the testimony of Ms. McCullough, Mr. Ligon, Mr. Adams and Mr. Humble. Each of these witnesses testified credibly and consistently regarding Mr. Davies conduct. Comparatively, Mr. Davies was combative, evasive and uncooperative when he testified. Where Mr. Davies did admit to using profane language, calling Mr. D'Angelo and Mr. Ligon an ass, the Union took the remarkable position that the word "ass" is not a profane and unprofessional word. (Tr. at 229:2-16). That position, along with Mr. Davies testimony, should not be credited.

[2] Mr. Hawks, after being confronted with his notes of the meeting, admitted that Mr. Davies did make a comment about knowing other employees removed food from the Weston Facility. (Tr. at 206:1-15).

B. J&J is not required to bargain over the decision to suspend the provision of QA food samples to employees or the change to plant visitation rules.

1. The decision to suspend the provision of QA samples did not result in a material, substantial and significant change to working conditions and there was no unbroken past practice of providing samples.

J&J did not violate its bargaining obligation by unilaterally suspending the provision of QA samples because the suspension did not result in a material, substantial and significant change to working conditions. In Weather TEC Corp., 238 NLRB 1535, 1536 (1978), the Board concluded that an employer's unilateral decision to stop providing daily free coffee and coffee supplies to its employees was lawful because the unilateral decision was not a "material, substantial and significant" change to the employees' working conditions. Id.

Similarly, J&J's decision to suspend provision of QA samples did not result in a "material, substantial and significant" change to the employees working conditions. QA samples were only provided when the QA sample lab was operating, usually twice a week at irregular intervals. (Tr. at 292:7-10). Roughly 24-32 samples would be provided at a time (for a plant that employs 165 individuals) and the samples were no larger than a small hot pocket. (Tr. at 401:3-4).[3] The samples were not provided to the employees on a daily basis. There was no credible testimony that the employees relied on these samples in any way as a consistent source of food or as an employer provided meal option. In fact, as the QA lab did not run during all shifts, many employees never had the opportunity to enjoy QA samples. At most, the QA samples, like the coffee in Weather TEC Corp, were a *de minimus* provision to employees who

[3] McGuire's testimony that multiple products were provided by the QA lab as samples and that samples were provided on a daily basis is unsupported by any record evidence and is false. Every employer witness rebutted Mr. McGuire's testimony and made clear that only line two handheld product was provided by the QA lab as a sample and the samples were provided no more than two times a week at irregular intervals. Mr. Humble credibly testified that only line two handheld product was provided as a sample and that employees were not allowed to take food home after 2012. (Tr. at 447:7-21; Tr. at 450:1-4).

happened to be at the facility at the right time and one that the employer was free to change or suspend at its discretion.

Moreover, the decision to suspend the QA samples was motivated by a concern for protecting the Weston Facility's USDA license. It is in direct violation of USDA regulations for QA samples and other product not designated for sale to be sold outside the facility. J&J was concerned that if the allegations made by Mr. Davies were true- that employees were selling QA samples and other product outside the facility- the Weston facility could lose its USDA license. It is axiomatic that an employer is not required to bargain over changes that are required or necessitated by law. Murphy Oil USA, 286 NLRB No. 104, *8 (1987) (no violation of bargaining obligation where change is necessitated by law).

Finally, there is no unbroken practice of providing QA samples that would necessitate bargaining over the decision to suspend them. The undisputed testimony is that in the winter and early spring of 2012, the management of the Weston plant unilaterally suspended the provision of QA samples, along with several other practices related to food consumption and food removal from the facility, because of a concern that employees were removing product from the plant. The employer did not provide the union with notice or bargain over its decision to suspend QA samples. (Tr. at 136:19-23). The Union did not contest or grieve that decision.[4] (Tr. at 131:20-22; 450:13-16). More importantly, at the subsequent round of bargaining, the Union never broached the subject of QA samples or asserted that J&J lacked the authority to unilaterally stop the practice. The Union's conduct during the first suspension of QA samples underscores that the Union did not believe then, and does not believe in good faith now, that the employer has an

[4] There is no dispute that ship steward McGuire was aware of the decision as he admitted he attended the meeting during which the change was announced and that he was fully aware of the unilateral change. He also stated that another employee told him he was going to file a grievance regarding the decision. (Tr. at 56:1-3).

obligation to bargain over the suspension of QA samples and evidences that there is no consistent unbroken practice of providing them.

In fact, it is the Union that is acting inconsistently by challenging the J&J's right to suspend QA samples. In 2012, the employer not only suspended QA samples, but also took the more dramatic step of preventing employees from taking home any product. Prohibiting the removal of product to take home is certainly more egregious and more impactful to the employees than simply suspending the samples; yet the Union did nothing. The Union's failure to act then demonstrates that the Union knew the employer had the right to stop the QA sample practice, and the Union's position today is merely a disingenuous attempt to compensate for the Union's failure in 2012.

Accordingly, as J&J had no obligation to bargain over the decision to suspend QA samples, the instant allegation should be dismissed.

2. J&J is not required to bargain over the change to plant visitation rules because the change was not a material, substantial or significant one.

It is well settled that not every unilateral change to plant visitation or access rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must amount to a "material, substantial and a significant" change. Where the change unilaterally imposed is not "material, substantial and significant," there is no breach of the bargaining obligation.

For example, in Peerless Food Products, 236 NLRB 161 (1978) the employer unilaterally narrowed its practice of allowing general access to a union representative to one confining the union representative's access to the production areas of the plant. Id. The Board concluded that the employer did not violate its duty to bargain because the change in access rules was not material, substantial and significant. Id. The Board noted that the change in no way diminished

the employees' ability to access their union representative or limited the union representative's ability to perform his functions. Id.; see also Nynex Corp., 338 NLRB 659, 662 (2002) (employer's unilateral decision to cancel union representatives access card and require him to present identification to gain entrance into the plant was not a violation of the employer's bargaining obligation because, as a result of the change, the "Union as not denied access to any unit employees at the workplace."); National Sea Products, 260 NLRB 3 (1982) (employer's unilateral decision to restrict union representative from the production floor was not a material, substantial or significant change.).

Similar to the situation in Peerless Food Products, the change in plant visitation/access rules at issue here were not material, substantial or significant. It is undisputed that the employer changed its plant access rules to require: 1) 24 hour notice of a planned plant visit; 2) notification of the Plant Manager or HR Manger when a Union representative arrived at the facility and 3) that the Union representative limit visits to the cafeteria.[5] There was **zero** evidence presented at the hearing that these changes limited the Union representative's ability to perform his function or diminished employees' access to their representative. Not a single employee testified that because of the new rules their access to the union representative had been damaged.

Illustrating the *de minimus* nature of these restrictions, Mr. Davies admitted that he spent most of his time in the cafeteria. (Tr. at 77:12-13). It is incomprehensible that Mr. Davies's ability to represent his members would be limited by requiring him to remain in the area, the cafeteria, where he spends the preponderance of his time. Moreover, one of the changes,

[5] The employer specifically denies that it has ever required the Union representative to only visit during administrative hours. The General Counsel did not proffer any evidence regarding the allegation that the employer requested that the Union not use the cafeteria as "Union hall" or that the employer requested that the Union limit the duration of their visits to "a respectable amount of time." As there was no evidence to support these allegations, the General Counsel has failed to meet its burden of proof and the allegations should be dismissed.

requiring the Union representative to notify the Plant Manager or HR Manager, is merely conforming the visitation rule to the Parties CBA which requires notification of the Plant Manager or his designated representative.[6] Just as in Peerless Food Products, the changes at issue here are not material, substantial or signification and, therefore, no duty to bargain arose.

C. J&J Did Not Directly Deal With Employees Regarding Its Refusal to Provide Updated Employee Contact Information Without Employee Consent

It is well settled that Section 7 rights belong to the individual employee. See In re IBM Corp., 341 NLRB No. 148 (2004) (Section 7 rights are enjoyed by employees and are in no way dependent on representation for implementation). An employer does not violate the act when it informs an employee of his or her individual rights, including Section 7 rights. People Gas System, 275 NLRB No. 75 (1985) (it is not unlawful for an employer to inform employees about their Section 7 rights).[7] In this instance, J&J's letter seeking employee permission before disclosing personal contact information to the Union was merely seeking to vindicate each employee's individual rights. J&J's letter informed its employees about the Union's information request and, out of an abundance of caution for the individual employee's confidentiality rights, requested that the employee consent to the disclosure of personal contact information before it was provided to the Union. J&J neither refused to provide the information to the Union nor attempted to solicit employee feedback regarding a subject that it should have directly addressed with the Union. Tellingly, multiple employees were uncomfortable with providing personal contact information to the Union. (Tr. at 119:10-13). Moreover, there was no credible evidence that J&J had ever provided this information without requesting permission from its employees.

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[6] The Union has filed an arbitration action contesting J&J's interpretation of the CBA regarding plant visitation. While the Parties may dispute the requirements of the CBA, there can be no dispute that this disagreement does not rise to the level of an unfair labor practice because of its *de minimus* effect on the Union's representative.

[7] Mr. Davies testified that he believed that it was unlawful to seek members' permission to release information to him because "that gives the employee the right or the perceived right to exclude things from the union." (Tr. 119).

Surely an employer cannot violate the act, which enshrines individual, not Union rights, by protecting employees' confidential information. As protecting employees' confidential information is not direct dealing or volative of the NLRA, the instant allegation should be dismissed.[8]

D. J&J's April 24, 2014 Letter was not Unlawful

J&J's April 24, 2014 letter was not unlawful because it merely informed the employees as to the fact that Mr. Davies had been banned from the facility and explained why J&J took that action. J&J is permitted to communicate with its employees and inform them on its course of conduct. The general counsel presented **zero** evidence supporting its allegation that this letter had a chilling or destructive effect on employees' willingness to exercise their section 7 rights. In fact, the General Counsel did not call a single employee to testify as to the effect of this letter. Moreover, the letter itself promises the employees no benefits for repudiating the Union nor does it suggest any retaliatory acts for being members of the bargaining unit. Contrary to the General Counsel's characterization, J&J was being forthright with its employees as to why it banned Mr. Davies from the premises and no other reading of the letter is supportable by the evidence presented at the hearing. Accordingly, the General Counsel has failed to carry its burden and this allegation must be dismissed.

E. A Negative Inference Should be Drawn Against the Union for its Failure to Comply With J&J's Subpoena

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting the evidence or cross-examine about it and drawing adverse inferences against the non-complying party. ADF, Inc., 355 NLRB No. 14

[8] J&J has communicated to the Union that it will no longer directly solicit employee shift preferences. Accordingly, that part of the Complaint is moot.

(2010); Paint America Services, Inc., 353 NLRB 973, 989 (2009). Drawing an adverse inference is the preferred option where the hearing has concluded and the noncomplying party has already been allowed to present evidence. Id.

Here, it is undisputed that the Union failed to ask their current Weston Facility representative whether he had any responsive documents, including emails. (Tr. at 262:5-14).[9] While testifying, the Union representative, Jaime Olvera, stated that he did have potentially relevant emails. (Tr. at 262:2-4). To date, the Union has failed to produce any of these potentially relevant emails. The Union's action constitutes flagrant non-compliance with a NLRB subpoena. As Mr. Olvera has already testified, the appropriate remedy is to draw a negative inference against his testimony, as well as the testimony of the other two Union witnesses, Mr. Hawks and Mr. Davies. The hearing officer should infer that had responsive documents been produced, those documents would have contradicted the testimony of Mr. Hawks, Mr. Davies and Mr. Olvera.

[9] The Union's argument that the subpoena did not seek documents from Mr. Olvera is frivolous and disingenuous. First, in the Union's Petition to Revoke the Subpoena, the Union specifically objected to the subpoena because it requested documents from "Mr. Hawks and **the Union**." (*emphasis added*). As Mr. Olvera is a union business representative who currently represents the Weston facility, the Union's bald assertion that he was not included in the subpoena is meritless. Second, on a December 12, 2014 conference call with the hearing officer for the specific purpose of clarifying the scope of the subpoena, the Respondent specifically narrowed its subpoena request to documents from 2014. As Mr. Olvera represented the Weston Facility during that time period, he clearly could possess responsive documents. Finally, Exhibit A on its face seeks documents from the entire Union, not just Mr. Hawks and Davies. Simply put, there is no justification for the Union's failure to inquire as to whether Mr. Olvera, a witness who was subpoenaed and testified in this hearing, possessed any responsive documents.

IV. Conclusion

For the foregoing reasons, J & J requests that the Complaint be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2015, I caused to be filed a true and correct copy of the foregoing Post Hearing Brief to be filed via the NLRB's official Electronic Case Filing system. By virtue of this filing, as well as the emailing of an electronic copy of the same, service is complete upon the following:

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